U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 25Apr2001

CASE NO.: 2000-LHC-1787

OWCP NO.: 08-115945

In the Matter of:

JOHN M. SANT
Claimant

v.

SOUTHERN SANDBLASTING AND COATINGS, INC.
Employer

and

CLARENDON NATIONAL INSURANCE CO.
c/o F.A. RICHARD AND ASSOCIATES
Carrier

APPEARANCES:

Bruce K. Bornefeld, Esq.
For Claimant

John R. Walker, Esq.
For Employer

BEFORE: **James W. Kerr, Jr.**
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by John M. Sant (Claimant) against Southern Sandblasting and

Coatings, Inc. (Employer) and Clarendon National Insurance, Co. c/o F.A. Richard and Associates (Carrier). The formal hearing was conducted at Metairie, Louisiana on October 30, 2000.

Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence:

1) Court's Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-16, 18; and

3) Employer's Exhibits Nos. 1-19.[2]

Upon conclusion of the hearing, the record remained open for additional exhibits and the submission of post hearing briefs, which were received by both parties.[3] This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS

After an evaluation of the record, this Court finds sufficient evidence to support the following stipulations:

(1) The parties agree that jurisdiction is proper under the Longshore and Harbor Workers' Compensation Act and the United States Department of Labor;

(2) The parties agree that the Administrative Law Judge has jurisdiction over the issue of whether Employer violated Section 48(a) and determination of damages (loss of wages), interest, restoration of Claimant to his employment by Employer, and attorney's fees, if any;

(3) Claimant was employed by Employer on and before January 12, 1999, as a timekeeper;

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through January 2001.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: CTX- Court's Exhibit, CX- Claimant's Exhibit, RX- Employer's Exhibit, and TR- Transcript of the Proceedings.

[3]Claimant submitted exhibits 19, 20, and 21 post-hearing.

(4) On January 12, 1999, Claimant allegedly injured his lower back in the course and scope of his employment with Employer, at which time Employer was engaged in the repair and refitting of a ship or vessel described as an offshore oil and gas drilling unit on, or adjacent to, the navigable waters of the United States;

(5) Employer filed its Notice of Occupational Injury/Disease (LS-202) on or about January 22, 1999[4];

(6) Claimant filed a claim for compensation (LS-203) on or about January 27, 1999[5];

(7) Notice of Controversion (LS-207) was filed on or about February 2, 1999[6];

(8) Employer terminated Claimant's employment on or about August 10, 1999;

(9) At the time of termination, Claimant was paid $11 per hour for up to 40 hours, and $16.50 per hour for all hours over 40 hours per work week;

(10) From January 1, 1999 until August 10, 1999, Employer paid Claimant gross wages of $33,049.68;

(11) An informal conference was held on March 3, 1999, at which time the Claims Examiner recommended that Claimant had not established a prima facie case for discrimination under Section 48 of the LHWCA[7]; and

(12) Both parties filed LS-18 forms and the claim was referred to the Office of Administrative Law Judges[8].

ISSUES

The unresolved issues in this case are:

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[4]*See* Claimant's Exhibit 1, Employer's Exhibit 1.

[5]*See* Claimant's Exhibit 2, Employer's Exhibit 2.

[6]*See* Claimant's Exhibit 3.

[7]*See* Claimant's Exhibit 4, a memorandum of the informal conference, dated March 14, 2000.

[8]*See* Claimant's Exhibits 5, 7 and Employer's Exhibit 3. *See also* Claimant's Exhibit 6, letter of referral for formal hearing to Hon. John Vittone, dated April 5, 2000.

(1) Whether Claimant has established a prima facie claim of discrimination under Section 48 (a) of the LHWCA;

(2) Whether Employer violated Section 48 (a) of the LHWCA in firing Claimant;

(3) Whether Claimant has mitigated damages and whether Claimant is legally required to mitigate his damages;

(4) Whether Claimant is entitled to reinstatement, past wages, interest, or attorney's fees; and the amount of past wages, interest and attorney's fees which Claimant is entitled to recover;

(5) Whether Claimant was terminated for forging his supervisor's signature on an expense report form;

(6) Whether Claimant is entitled to attorney's fees and expenses since Employer complied with the recommendations of the District Director following informal conference; and

(7) Whether Employer is entitled to reduce Claimant's lost wages by the amount of compensation which Claimant received from the Texas Workforce Commission, if any.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Ernest Watson, Sr.[9]

Mr. Ernest Watson testified that he is the president and CEO for Employer, a Texas corporation. Employer is in the business of sandblasting and painting vessels. Mr. Watson usually works out of the main office in Dayton, Texas, unless he is traveling for business. Employer also has field offices which vary according to the location of its current job.

At the time Claimant was terminated, Employer was staging up, sandblasting and painting the OCEAN CONFIDENCE. This job lasted over one year, ending in March 2000, and employed more than

[9]Evidence of Mr. Watson's felony conviction was submitted to this Court as Claimant's Exhibit 19. However, as Claimant's Exhibit 19 already existed, Mr. Watson's felony conviction was renumbered to Claimant's Exhibit 21.

200 employees.[10] For performing this job, Employer received about $8 million. At the end of this job, most of the 200 employees were laid off.

At the time of his termination, Claimant was working for Employer as a timekeeper, assigned to the OCEAN CONFIDENCE job, in Port Arthur, Texas. He completed the paper work for that rig and filed the records in that field office. Mr. Watson thought he might have talked to Claimant when he periodically called the various job sites. Mr. Watson never had any complaints about Claimant's job performance. He explained that, even though Claimant was hired as a timekeeper, it would not be inconceivable for him to perform outside activities in addition to office work. Mr. Watson was unsure as to why Claimant was hired to perform light duty activities, but explained that Roland Vickers, the superintendent in the field, hired all employees, including Claimant.

Mr. Watson ultimately decided to terminate Claimant because of a forged expense report. He reached this decision after talking with Roland Vickers, Claimant's supervisor, on August 10, 1999. During the conversation, Mr. Vickers stated that Claimant no longer spent as much money on gas since he stopped driving his own personal truck and began driving Mr. Vickers' truck for errands. Mr. Watson congratulated Mr. Vickers for his quick completion of Claimant's recent expense report, considering he had just returned to work after being out for knee surgery.[11] Mr. Vickers stated that he had not signed a report for Claimant and asked Mr. Watson to fax it to him. When Mr. Vickers received the fax, he reviewed the signature, determined it was a forgery and stated Claimant must have signed it himself. Mr. Watson was unsure whether anyone witnessed Claimant actually signing that expense report. Because of the forged signature, Mr. Watson ordered Mr. Vickers to terminate Claimant.

When Mr. Watson called the field office the next day, he was surprised to hear from Mr. Vickers that Claimant had yet to be fired. Mr. Vickers did not think it was possible to fire an employee who was working on light duty. Mr. Watson explained that company policy permits the termination of an employee for forgery. Mr. Watson, therefore, ordered Mr. Vickers to terminate Claimant. Claimant was subsequently fired. Mr. Watson stated that he had never fired an employee for similar activities, because this was the first occurrence of forgery. Mr. Watson never asked Claimant if he had forged Mr. Vickers' signature or why he would do such a thing.

During the period Claimant worked for Employer, Claimant's father was also an employee. Claimant's father was a supervisor, but not as high-ranking as Mr. Vickers. Mr. Watson has known

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[10]Mr. Watson explained that two rigs were being repaired. About 100 men were assigned to each rig.

[11] Mr. Watson testified that Mr. Vickers filed a LHWCA claim for an injury that occurred in the course and scope of his employment with Employer. No adverse action was taken against Mr. Vickers. He also testified that Mr. Vickers is no longer employed by Employer, and that when his employment ceased, no adverse personnel action was taken against him.

Claimant's father for over 30 years and considers him a good friend. Mr. Watson stated that he does not harbor a grudge or have feelings of personal animosity against Claimant.

Mr. Watson identified the forged expense report as page 1 of Employer's Exhibit 5. Mr. Watson was unable to identify Mr. Vicker's signature because he was not a handwriting expert. He based his belief of the forged signature on his telephone conversation with Mr. Vickers, who had identified the forged signature from a faxed copy. Mr. Watson also examined Claimant's Exhibit 8, a separation notice form.

Mr. Watson believed several Longshore and Texas workers' compensation claims had been filed against Employer. He explained that Employer's business was very dangerous and no individuals had been fired because of filing claims. To his knowledge, Employer had never taken any adverse personnel actions, including firing, demotion, or reduction in wages, against any person who filed for workers' compensation under the LHWCA or Texas law. Mr. Watson testified that Claimant's termination in August 1999 was unrelated to the LHWCA claim previously filed. Mr. Watson, in fact, was unaware of any injury Claimant sustained or any compensation claim he might have filed. Claimant was terminated solely because of the forgery of a $35 expense report.

Leon Brock Williams

Mr. Williams testified that he is the safety manager for Employer. His duties include investigating accidents, job-site inspections and the handling of workers' compensation claims, both under the LHWCA and Texas law. As regards the reason why Claimant was terminated, he read in Employer's separation report that Claimant had violated company policy.[12] Mr. Williams had no discussion with Mr. Watson regarding Claimant's termination.

On August 10, 1999, Mr. Williams stated that 4 people company-wide were on light duty. On the OCEAN CONFIDENCE project, there were 2 such employees. However, Claimant was not one of those light duty employees. Employer offered a light-duty program for qualifying employees. These employees were assigned work based on doctor restrictions.

Claimant filed a workers' compensation claim on January 12, 1999, with regards to a lower lumbar strain. This was an injury similar to one Claimant received prior to working for Employer.[13] Mr. Williams did not know whether or not Claimant had disclosed this fact to Roland Vickers when he was hired on August 28, 1998. Mr. Williams, according to company policy, completed Employer's first report of injury

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[12]*See* Claimant's Exhibit 8 and Employer's Exhibit 7, the separation report signed by Roland Vickers on August 12, 1999. Claimant's last day of work was August 10, 1999, at a pay rate of $11 per hour. Claimant was accused by Ernest Watson of falsifying expense reports.

[13]The evidence will show that Claimant injured his back in May 1997, while employed by Nally Inc., and had subsequent surgery.

(LS-202) for Claimant's lower back lumbar strain. Prior to this January incident, Claimant had four other reportable injuries. No compensation was paid for these injuries. Employer did, however, pay for the initial one-time treatment at the local clinic.

Mr. Williams was familiar with Employer's layoff procedures. In December 1999, between 20 and 30 employees were laid off during the OCEAN CONFIDENCE job. At the completion of the job, in March 2000, the rest of the employees were laid off. Employer never rehired these laid off employees. If Claimant had not been fired as a timekeeper in August 1999, he would have reasonably and foreseeably been laid off, at the very latest, in March 2000. After Claimant was fired, no one was hired to replace him. Rather, Roland Vickers undertook the timekeeping duties.

Mr. Williams testified Claimant was not fired because he filed a workers' compensation claim. Even though Claimant was fired because he violated company policy, the fact that he filed a claim, in Mr. Williams' opinion, did not aggravate the situation.

Mr. Williams has been the safety director for three years. During that period, Mr. Williams was not aware of any employee being fired by Employer because he filed a workers' compensation claim. He stated that about 80 compensation claims, state and federal, had been filed in those three years. During that period, Employer has not discriminated, in the form of demotions, salary reductions, adverse personnel decisions, or being denied raises, training, or promotions, against any employee who filed a workers' compensation claim. Employer does not terminate an employee for filing workers' compensation claims. Rather, Employer handles the claim swiftly so employees return to their original position.

Timekeepers received an hourly salary. Per diem for lodging and meals was received for out-of-town assignments. Mr. Williams examined Claimant's Exhibits 9 and 10. Exhibit 9 contained the year-to-date earnings on checks. Exhibit 10 contained Claimant's W-2 form. Mr. Williams stated Claimant's earning checks had amounts different from the W-2 form, because the earnings checks contained Claimant's per diem.

John Michael Sant

Claimant testified at trial.[14] He graduated from high school and completed six months of Community College. Claimant has been employed by Employer on three separate occasions, beginning in 1994. Claimant worked for Employer in August 1994 for four months as a laborer. He was next

[14]Employer's Exhibit 12 is the deposition of Claimant.

employed in March 1996 for 11 months as a laborer, with duties including paint mixing, spraying and sandblasting. Claimant was last employed by Employer from August 28, 1998 until August 10, 1999, as a timekeeper.[15] Claimant testified that his father and Mr. Vickers were close friends and that his father probably helped him obtain this last job with Employer.

A laborer earned more money than a timekeeper. As a timekeeper, Claimant earned $10 per hour, until he received a raise, earning $11 per hour. On numerous occasions Claimant performed duties outside of the office, including helping to organize the paint crew.

On January 12, 1999, Claimant injured his back while showing the crew the procedure for opening paint cans. Claimant never received workers' compensation for this injury, but Employer did pay for his first medical treatment at Tower Medical and the emergency room expense in Port Arthur.[16] All of Claimant's transportation costs, to and from the doctors, has also been paid by Employer.[17]

Claimant testified that he had no lost time as a result of this injury. In fact, Claimant continued to work 40 hours per week, plus overtime, at the same rate of pay. Dr. Greer, Claimant's surgeon, sent a note to Employer stating that Claimant was to work light-duty beginning January 12, 1999. Claimant testified that he faxed a copy of this report to Brock Williams.[18]

On the day Claimant was fired, he had two telephone conversations with Mr. Watson. Claimant initially called Mr. Watson because Lawrence Landers, a supervisor, told him all employees on light duty were to be limited to working only 40 hours per week. Claimant believed he could not support his new family working only 40 hours. Mr. Watson assured Claimant that if Roland Vickers was satisfied with his performance, he had a job. Mr. Watson inquired as to why Claimant was working light duty and Claimant explained he had injured his back in January while opening a can of paint. Mr. Watson then asked to speak with Roland Vickers, who was out of the office.

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[15]Claimant testified that he applied for and was accepted for the timekeeper position, even though it was a light-duty position. He was not given this job because he was on light-duty, but rather he applied for this position.

[16]Claimant filed a claim for compensation on January 27, 1999. He retained a lawyer after having difficulty arranging for an appointment with Dr. Greer.

[17]Employer's Exhibit 10 is Claimant's request for mileage reimbursement. Claimant was approved by F. Michael Oakes, Marine Adjuster, for two round trips from Port Arthur to West Monroe and back to see Dr. Greer, for a total of 684 miles. Based on the DOL approved rate of $0.31 per mile, Claimant was reimbursed $212.04.

[18]*See* Claimant's Exhibit 5, page 4.

Mr. Watson called back ten minutes later. Claimant answered the phone and transferred the call to Mr. Vickers, who asked Claimant to step outside of the office. Claimant, therefore, walked about 20 feet away from the office trailer to the restrooms and soda machines for the duration of the conversation. When Mr. Vickers asked Claimant to return to the office, he fired Claimant and explained the termination was due to a forged expense report. Claimant believed the expense report incident had been cleared up, because Mr. Vickers had previously admitted to him that he signed the report.

Part of Claimant's duties as a timekeeper was to complete each employee's weekly expense report. Mr. Vickers subsequently signed each report every Monday morning before Federal Express arrived to pick up the documents. As regards the particular expense report in question, Claimant stated he had not finished entering the data on his report before Federal Express arrived Monday morning. Therefore, Mr. Vickers signed Claimant's expense report that afternoon and sent it out the following Monday. This occurred two weeks prior to Claimant's termination.

Claimant examined Claimant's Exhibit 5, the expense report. Claimant testified that he filled out the information and Roland Vickers' signed his own name to the report. Claimant testified that he had never filled out an untrue expense report. Claimant has only once signed the name of Roland Vickers and that was after obtaining Mr. Vickers' permission. Claimant testified that he was never dishonest while working for Employer and had never violated any of its policies. When Claimant began work in August 1998, he signed the employee booklet and was aware that if he falsified company records, or was found guilty of theft of company property, he could be terminated.[19]

Claimant examined Employer's Exhibit 9, a letter written by Mr. Vickers on Claimant's behalf stating the reason he was terminated. Mr. Vickers explained the confusion with his signature as a difference in the color of ink used for his signature. Claimant also wrote a statement as to why he was fired, different from Exhibit 9, and presented it to Mr. Vickers for his signature. Mr. Vickers refused to sign this statement because, as Claimant explained, "there was a lot of hard feelings for me being fired."

Claimant believed he was fired because he told Mr. Watson he was on light duty beginning January 12, 1999 and continuing through August 12, 1999. Employees on light-duty only worked a maximum of 40 hours per week, but Claimant had worked and been paid for 70 to 90 hours of work per week, plus overtime.

After Claimant was terminated, he filed for and received unemployment benefits from Texas.[20]

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[19]*See* Employer's Exhibit 8, an excerpt from Employer's employment book, signed by Claimant, dated August 31, 1998. It stated that a violation of any of these rules, including "falsification of personnel, time production, or any other company record," will result in immediate discharge.

[20]*See* Employer's Exhibit 17, records from the Texas Workforce Commission. Claimant received unemployment benefits from August 15, 1999 through December 18, 1999.

Claimant testified that he had four prior workers' compensation claims for injuries against Employer, including one for a deck blaster falling on his knee, a paint box falling on his forearm, and a broken rib.[21] Claimant lost no time for these other injuries. Claimant testified that Employer did not discriminate in any way for those prior injuries.

Claimant was not aware of any other employee who was terminated, fired, or subject to an adverse employment or personnel action for filing a workers' compensation claim. Claimant testified that a few employees had been fired because of illegal drug use and the inability to perform their job. Claimant believed that Employer would fire someone for filing a workers' compensation claim. However, he had never heard of anyone being fired or discriminated against because of filing such a claim.

In September 1999, Claimant was offered a job with Fulk's Heating and Air Conditioning. Because this job only paid $7 an hour, less than Claimant earned as a timekeeper for Employer, he refused the offer. From March 21, 2000 until July 3, 2000, Claimant worked for Terry Joe Sant, his second cousin, doing lawn maintenance and landscaping. Mr. Sant paid Claimant $75 a day.[22] In August 2000, Claimant went to work for Steel Maintenance in Louisville, Kentucky, doing blasting and painting work. Claimant earned $11 an hour and worked 62 hours in three weeks. Since this was less than the amount of work promised, Claimant quit and went to work for Mansfield Industrial Coatings in Monroe, Louisiana in September 2000. He earned $12.50 per hour. Claimant is presently employed for Diamond K as a painter, earning $15 per hour, working between 40 and 50 hours per week.

II. OTHER NON MEDICAL EVIDENCE

1. DEPOSITIONS

Roland Vickers

Claimant's Exhibit 19 is the deposition of Roland Vickers, Claimant's supervisor, taken post-trial on December 1, 2000. He testified that while he is not a handwriting expert, he can recognize his own signature. He examined Exhibit 1, Claimant's expense report.[23] Mr. Vickers stated he never told Mr. Watson that Claimant had forged his signature to this document. Mr. Vickers stated that the signature

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[21]*See* Employer's Exhibit 4, Claimant's prior claims for compensation. Claimant was injured on August 16, 1996, February 3, 1997, November 11, 1998, and June 27, 1999, while working for Employer. He subsequently filed claims under the LHWCA.

[22]*See* Employer's Exhibit 16, a statement from Claimant dated August 1, 2000, stating that he worked 65 days at $75 per day, for a total gross earnings of $4875.

[23]Attached to the deposition was Exhibits 1 and 2. *See also* Employer's Exhibit 5, the expense report.

looked like his, but he was unsure.

Mr. Vickers had thought perhaps the signature was not his because Mr. Watson had two expense reports for that week, as opposed to the usual one report.[24] Claimant explained to Mr. Vickers he had misplaced the expense report, so it was sent along with the next week's report. If Mr. Watson received two expense reports at the same time, it was because one was misplaced or was not sent in the week it was due.

When Mr. Vickers talked to Mr. Watson on August 10, 1999, he was not looking at the expense report. He was in his office in Port Arthur and Mr. Watson was in the Dayton, Texas office. A copy of the expense report was subsequently faxed to Mr. Vickers. Mr. Vickers told Mr. Watson he was unsure of the authenticity of the signature. Mr. Watson made the decision to fire Claimant and ordered Mr. Vickers to do so. Claimant was therefore terminated on August 10, 1999.

During this conversation, the two men also discussed Claimant's light duty status. Mr. Watson's response was to let the insurance company handle Claimant's injury. He did not want an employee working for the company who would forge an expense report. Mr. Vickers testified that the forged expense report was the reason for Claimant's termination.

Mr. Vickers testified that he had been satisfied with Claimant's work prior to his termination. In fact, Claimant had even received a raise, approved by Mr. Watson. When Mr. Vickers hired Claimant in August 1998, Claimant never indicated he had physical limitations. Rather, Claimant and his father assured Mr. Vickers, that while Claimant had been injured at his previous employment, he had been released to work full duty. When Claimant was terminated, he did not appear in any way disabled.

Claimant's duties for Employer included working in the office, mixing paint, and retrieving office supplies. He had multiple supervisors, including Roland Vickers, Lawrence Landers, and his father, John Sant. While working for these other men, Claimant mixed paint. Before Claimant was terminated, Employer instituted a policy for employees working light-duty jobs due to injuries, which stated their work load was to be limited to 40 hours per week. Claimant, while working in the office, worked more than 40 hours per week. He completed office paperwork during the week and occasionally on weekends. Mr. Watson never commented to Mr. Vickers about Claimant working more than 40 hours per week.

Several weeks prior to Claimant's termination, Messrs. Vickers and Watson discussed Claimant's excessive gasoline expenses. Mr. Watson asked Mr. Vickers to "cut back" Claimant's expenses.

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[24]The normal procedure for the weekly expense reports was as follows: Every week each employee, including Claimant, submitted his receipts to Mr. Vickers, who gave them to Claimant for his use in completing the expense report. Mr. Vickers then signed these completed reports and sent them with Federal Express to the main office in Dayton.

Apparently, Claimant's number of tanks of gas was steadily increasing each week. As a solution to this problem, Mr. Vickers instructed Claimant to use his (Mr. Vickers') truck since he had a company allowance.

Mr. Vickers examined Exhibit 2, the statement he wrote for both Claimant and Claimant's father, dated August 12, 1999.[25] Mr. Vickers wrote and signed the statement. It stated that Claimant was terminated at the direction of Ernest Watson on August 10, 1999, because Mr. Watson did not want an employee working in the office who could "steal from the company."

> Approximately, 2 weeks prior to this Ernest questioned some expense reports that w[ere] sent in for Claimant. This was due to [the] difference in the color of ink which Roland Vicker (myself) signed the report. The one report in question was from previous weeks out of pocket expense and was supposedly signed at a different time. (Exhibit 2, page 2)

Mr. Vickers had no knowledge about Claimant's January 12, 1999 accident or subsequent LHWCA claim because he was off of work due to his own injury. Mr. Vickers stopped working in December 1998 and returned on March 22, 1999. Upon returning, he learned that Claimant had been injured in January. Mr. Vickers sustained an on-the-job injury to his knee and filed a workers' compensation claim. He received weekly benefits and compensation checks during this time period. Employer also paid for Mr. Vickers' medical expenses. Mr. Vickers testified that Employer did not in any way discriminate against him regarding his workers' compensation claim. In fact, he has never been aware of Employer discriminating against any employee because of a workers' compensation claim.

It was Mr. Vickers' opinion that Employer did not discriminate against Claimant because he filed a workers' compensation claim. His reasons were as follows. Claimant had been injured in January, but continued to work until August. During that time period, Claimant received a raise. Claimant was also assigned other jobs, such as mixing paint, so that he would not be laid off due to lack of work.

As a supervisor for Employer, Mr. Vickers was not involved in any workers' compensation decisions. He was never asked to discriminate, terminate, or reduce an employee's hours or reduce their pay rate for a reason that was related in any way to their workers' compensation claim.

Mr. Vickers was last employed by Employer in 1999. He left Employer because he desired a change of employment. Since leaving Employer, Mr. Vickers has worked for Marine Industries, in Seattle, Washington and Brownsville, Texas. While working in Brownsville, Mr. Vickers was the general superintendent/project manager. He hired Claimant's father and Claimant to work with him on a project and will hire them both again in the future. He believed he was instrumental in obtaining employment for these two men.

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[25] *See* Employer's Exhibit 9.

John Thomas Sant

Employer's Exhibit 13 is the deposition of John T. Sant, Claimant's father, taken June 23, 2000. Mr. Sant has worked in the painting and sandblasting industry since 1965. He has worked for Employer since 1994 and his current position is supervisor. Roland Vickers is the production superintendent, a position senior to Mr. Sant.

Over the course of Mr. Sant's career as a sandblaster, he has never heard of an employee being fired for filing a workers' compensation claim. He has had no personal experience with the firing of an employee for filing such a claim. Mr. Sant previously filed a workers' compensation claim While employed by Employer and was not terminated because of his claim.

Mr. Sant was asked to examine Exhibit 1.[26] This exhibit was an undated statement, signed by Mr. Sant, stating his belief as to why Claimant was fired.[27] Mr. Sant believed Claimant was terminated by Employer for filing a workers' compensation claim for an injury sustained on January 12, 1999. However, he testified that he had no direct evidence this was true; it was a "gut feeling." His statement also discussed the conversation between Messrs. Watson and Vickers. However, while Mr. Sant was present in Mr. Vickers' office on August 10, 1999, he testified that he did not hear any part of the two men's conversation.

While Mr. Sant worked for Employer, many employees had workers' compensation claims pending against Employer. He testified that Employer fired between 20 and 25 employees for "any reason." Mr. Sant was not aware of an injured employee who required medical attention also being fired.

Mr. Sant has worked with Mr. Watson since 1974. He testified that Mr. Watson would not care whether Claimant was on light-duty or was receiving workers' compensation. Mr. Sant testified that he had no "axe to grind" against Claimant. He also stated that, after 4 years of working on the rig, he was able to distinguish the signatures of different employees. In fact, he himself had signed other employee's signatures when they were out of the office. He compared the signature on the "forged" expense report with other signatures of Roland Vickers and concluded that the expense report was not forged.

2. REPORT

Lillian J. Hutchison

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[26]Included with Mr. Sant's deposition was an exhibit.

[27]Mr. Sant testified that his wife faxed him this typewritten statement for his signature on September 13, 1999.

Claimant's Exhibit 20 is the report by Ms. Lillian Hutchison, dated January 24, 2001. Ms. Hutchison is a certified forensic document examiner who was employed by both parties to determine the authenticity of Roland Vickers' signature on Claimant's expense report. After examining Claimant's expense report, as well as the signatures submitted of Claimant and Roland Vickers, she rendered an inconclusive opinion.[28]

> It is very difficult to make a judgement on Roland Vickers signature because he is a very inconsistent writer. In order to know whether the differences that I perceive are truly differences or a part of his natural variations. There are not enough exemplars (signatures) to make that determination. Considering the possibility of Claimant being the author, the one half page of his writing that was supplied, strongly suggests that he does not have the writing skill (muscular control of the writing instrument) to execute the Roland Vickers signature in question.

In order to better determine whether Roland Vickers signed the expense report, Ms. Hutchison requested more exemplars of Roland Vickers, as well as signatures and writings of Claimant's father, John Sant. Because her opinion was inconclusive, Ms. Hutchison refused to give a percentage of certainty, write a Letter of Opinion, or take the witness stand, regarding the authenticity of the Roland Vickers signature.

3. MISCELLANEOUS

Employer's Exhibit 19 is Claimant's first supplemental responses to Employer's interrogatories and request for production. Employer's Exhibit 15 is Claimant's post-injury, pre-termination wage records. After Claimant's January 12, 1999 injury, he continued to work a regular 40 hours per week, as well as overtime hours, ranging between 5 and 52 hours per week.

Employer's Exhibit 18 is records from AIG claim services. Claimant's compensation claim for a May 9, 1997 back injury, while working for Nally, Inc, was accepted by AIG on May 28, 1997. Claimant underwent back surgery by Dr. Greer on July 14, 1997 and subsequently reached MMI on April 10, 1998. He was given a 25% PPD rating. Because Dr. Greer's restrictions were not clear-cut, Claimant underwent a FCE on May 4, 1998 and an IME by Dr. Horne on May 22, 1998. Dr. Horne assigned Claimant to a 10% disability impairment rating and returned Claimant to light duty. Claimant was instructed to return to work on June 15, 1998, but failed to do so. Also included were Claimant's medical records pertaining to this May 1997 injury. On August 24, 1998, Claimant signed a receipt and release, accepting a $30,000 settlement which discharged Nally, Inc. from further liability.

III. <u>MEDICAL EVIDENCE</u>

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[28] *See* Employer's Exhibit 6, Roland Vickers' signatures and handwriting exemplars.

Medical Center of Nederland

Claimant's Exhibit 18 is the report of Claimant's January 18, 1999 medical examination. Claimant was diagnosed with a lumbar strain and treated with Advil. He was released to light duty work 3 days later, with the following restrictions: no repeated pushing, pulling, or lifting over 0 pounds; no climbing over 0 feet; no repeated kneeling, prolonged squatting, bending, or stooping; no crane/motor vehicle operation; and no work on ladders/overhead.

Dr. Lance Craig

Claimant's Exhibit 12 is the initial medical report for the Workers' Compensation Insurance Carrier, signed by Dr. Craig. He examined Claimant on January 18 and 21, 1999. His diagnosis was a sprain in the lumbar region. Dr. Craig released Claimant to light duty work on January 18, 1999.

Dr. Bruce Golson

Claimant's Exhibit 14 is the MRI report of Claimant's lumbar spine. Claimant was examined on May 27, 1999 by Dr. Golson at the St. Francis Medical Center Department of Radiology and Isotopes. Dr. Golson's impression of the MRI was "postoperative findings at L5-S1 predominately on the left with some postoperative scarring. No recurrent disc. The postoperative scar is minimal. No obvious etiology identified for right lower leg pain. Negative study otherwise." (page 1)

Dr. Russ Greer

Employer's Exhibit 14 and Claimant's Exhibit 13 is the medical reports of Dr. Greer, a surgeon. Dr. Greer examined Claimant from June 19, 1997 through August 24, 1999. Claimant was examined following his January 12, 1999 injury on February 23, 1999, and an MRI was ordered and subsequently performed. Dr. Greer last examined Claimant on August 24, 1999. He performed a physical examination and discussed the findings of the May 1999 MRI with Claimant. Claimant complained of pain in his low back area and midline low back area. Dr. Greer recommended a lateral lumbar spine x-ray and re-evaluation after that study was completed.

Dr. Carl G. Goodman

Claimant's Exhibit 15 is the medical report of Dr. Goodman, dated January 12, 2000. Claimant's chief complaint was low back and right leg pain, which he believed was due to his January 12, 1999 injury. Dr. Goodman obtained Claimant's history and performed an examination. His impression was a lumbar strain and sprain with possible disc injury. He further stated that because he found no objective abnormalities to suggest recurrent disc herniation, he believed further surgery was unnecessary, as were additional MRI/CAT scans. Dr. Goodman recommended EMG/nerve conduction studies to delineate Claimant's etiology for pain. Dr. Goodman concluded that Claimant was able to work in a light duty

capacity.[29]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 115 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

DISCRIMINATION BY EMPLOYER, 33 U.S.C. §948(a)

Section 48(a) of the Act provides, in part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee had claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.

Section 48(a) prohibits discrimination by an employer (or his agent) against a claimant in retaliation for that claimant filing, or attempting to file, a compensation claim, or for testifying in a proceeding under the LHWCA. The essence of a discrimination claim is that the person who filed the compensation claim is treated differently than other similarly situated individuals. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 761, 21 BRBS 124 (CRT)(4th Cir. 1988).

The ultimate burden of persuasion lies with the claimant in a Section 48(a) case. *Martin v. General Dynamics Corp. Elec. Boat Div.*, 9 BRBS 836, 838 (1978). Claimant must prove that Employer committed a discriminatory act and that discriminatory act was motivated by animus against claimant because of the pursuit of his rights under the Act. *Geddes v. Benefits Review Bd.*, 735 F.2d 1412, 16 BRBS 88 (CRT) (D.C. Cir. 1984); *Holliman v. Newport News Shipbuilding & Dry Dock*, 852 F.2d 759, 761 (4th Cir. 1988). Once claimant has met his burden of proof, a rebuttable presumption

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[29]Claimant's Exhibit 11 and Employer's Exhibit 11 is Dr. Goodman's medical treatment report. He released Claimant to return to work performing light duty activities on January 12, 2000.

arises that the employer was motivated at least in part by claimant's filing of his claim. The burden of proof then shifts to employer to prove that it was not motivated, even in part, by claimant's exercising his rights under the Act. *Geddes*, 735 F.2d at 1417.

The Benefits Review Board has held that the assessment of penalties is an adjudicatory function transferred to the judge by the 1972 amendments. *Winburn v. Jeffboat, Inc.*, 9 BRBS 363, 369 (1978). The assessment is a discretionary matter to be based on the evidence presented during the trial. *See also*, 20 C.F.R. §702.273.

Claimant has worked for Employer on three separate occasions, beginning in 1994. He was last hired by Employer on August 28, 1998, as a timekeeper and assigned to the field office in conjunction with the OCEAN CONFIDENCE project. On January 12, 1999, Claimant injured his back while instructing the paint crew on the procedure for opening paint cans. He subsequently filed a claim for workers' compensation on January 27, 1999. Claimant continued working as timekeeper until August 10, 1999, when he was terminated.

On August 10, 1999, Ernest Watson, Employer's CEO, had a conversation with Roland Vickers, Claimant's supervisor.[30] They discussed Claimant's expense report. Apparently, Mr. Watson had two weekly expense reports for his review, which was very unusual. Normal procedure dictated that Mr. Watson reviewed only one expense report each week. Mr. Watson questioned Mr. Vickers about the signature on the report and inquired as to its authenticity, after Mr. Vickers commented that he had not recently signed a report for Claimant. As Mr. Vickers did not have a copy of the report, Mr. Watson faxed him one. Mr. Vickers examined the signature and was unable to verify that it was his own. Mr. Watson concluded that Claimant must have signed this report, because the only other person who had possession of the report had been Claimant. Part of Claimant's duties in the office included completing each employee's weekly expense report and submitting them to Mr. Vickers for his signature. Consequently, Claimant was terminated for forgery of a company record.

Claimant testified that he was aware of the company policy regarding forgery of documents and in fact signed a document to this effect on August 31, 1998. Claimant was also aware that "falsification of personnel, time production, or any other company record," resulted in immediate discharge.

As regards the "forged" expense report, Claimant testified that he did not sign Mr. Vickers' name. However, Mr. Vickers never once confirmed that the signature in question was his own. When asked about its authenticity, he always replied that he was uncertain. Lillian Hutchison, a certified forensic

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[30]This Court acknowledges Mr. Watson's felony conviction and has weighed his testimony accordingly.

document examiner, also examined the expense report. She was unable to render a conclusive opinion regarding the authenticity of the Roland Vickers signature on the report. In fact, she refused to offer a percentage of certainty, write a letter of opinion, or take the witness stand. As neither Mr. Vickers nor Ms. Hutchison can confirm that Mr. Vickers signed the expense report, this Court finds that Employer was reasonable to conclude, given the circumstances, that the report in question was forged. As Claimant was the only person who completed these expense reports with the appropriate details, it is also reasonable to conclude that Claimant was the employee who forged his supervisor's name.

Claimant has not offered sufficient evidence to conclude that Employer terminated his position because he filed a workers' compensation claim. In fact, there is no evidence other than Claimant's speculation that he was discriminated against because of this claim. In contrast, there is ample evidence to support Employer's assertion that Claimant's termination was solely based upon Claimant's violation of company policy.

Mr. Vickers, Claimant's father, John Sant, Mr. Williams and even Claimant testified that they have never heard of Employer discriminating against an employee for filing a workers' compensation claim. Both Mr. Vickers and Mr. Sant, employees situated similarly to Claimant, have filed claims

for compensation due to work-related injuries while employed by Employer. They also testified that no adverse action was taken against them for filing such claims.

Mr. Williams, Employer's safety director, testified that he handled Employer's workers' compensation claims. He believed that over the past three years, at least 80 compensation claims, both state and federal, had been filed against Employer. Regarding those employees, Mr. Williams testified that Employer has not discriminated against them, in the form of demotions, salary reduction, adverse personnel decisions or being denied raises, training, or promotions.

Claimant also argued that because he filed a workers' compensation claim and was on light-duty status as a result of his injury, Employer discriminated against him by limiting the number of hours he could work per week. As Claimant worked more than 40 hours per week, he asserts that he was fired because he violated Employer's unwritten policy that light-duty employees can only work 40 hours per week.

Claimant's light duty status is questionable. Upon being hired by Employer in August 28, 1998, Claimant testified that he applied for the timekeeping position, even though it was light-duty work. He was not assigned that position, but rather he applied for this position, which coincidently was considered a light-duty position. Mr. Vickers testified that upon hiring Claimant, both Claimant and Claimant's father assured him that while Claimant had been injured at a previous job, he had recovered and been released to full duty.

After his January 1999 injury, Claimant was examined and released to light-duty work by the Medical Center of Nederland and Drs. Goodman and Craig. No evidence was offered to show Claimant

has been released to full duty work. However, Mr. Williams testified that on August 10, 1999, four employees company wide were on light-duty assignments and Claimant was not one of those employees. Claimant has offered no evidence to show that as a possible light-duty employee, which was the result of an on-the-job injury, he was singled out and discriminated against. Rather, Employer appears to have instituted a policy company-wide regarding light-duty employees. In fact, Mr. Vickers testified that, prior to Claimant's termination, Employer had instituted a company wide policy restricting all light-duty employees to work only 40 hours per week. He also stated that Mr. Watson never commented on Claimant's overtime or excessive hours. This Court finds that Employer did not discriminate against Claimant with regards to the number of hours he worked.

There is also no evidence to show that Claimant's termination was motivated by discriminatory animus. Roland Vickers stated to both Claimant and his father, John Sant, that Claimant was fired because he falsified a $35 expense report. His written statement indicated that Mr. Watson did not want an employee working for Employer who could "steal from the company." It made no mention that Claimant was fired because he filed a workers' compensation claim. Claimant's termination was motivated by reasonable company policy, not discriminatory animus.

In addition, Claimant has filed four other workers' compensation claims against Employer. He was injured on the job on August 16, 1996, February 3, 1997, November 11, 1998, and June 27, 1999. Interestingly enough, Claimant does not assert that any of these claims were a basis for his termination. Even though Claimant had these other claims, Employer continued to rehire Claimant. After his January 12, 1999 injury, Claimant even received a raise. He also continued working as a timekeeper and was never demoted to another position. In fact, Roland Vickers testified that he was always satisfied with Claimant's job performance. He also stated that Claimant was given additional duties so that he would not be laid off for lack of work. Employer's actions appear to be anything but discriminatory.

Based upon all of the testimony and evidence, the Court can find no convincing evidence that Claimant was discriminated against due to his LHWCA claim. Claimant has failed to show that Employer committed a discriminatory act and that this act was motivated by animus against Claimant because he pursued his rights under the Act. Consequently, Claimant's claim for the assessment of Section 48(a) penalties against Employer is denied.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED, AND DECREED** that Claimant's claim for the assessment of Section 48(a) penalties is **DENIED**.

It appears that an award for attorney's fees is inappropriate. However, if counsel for Claimant

disagrees, then he must state with specificity his reasons for obtaining such an award. In that instance, counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. §702.132.

Entered this 25TH day of April 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.
Administrative Law Judge

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